99-71 July 8/99

No. ——

IN THE

Supreme Court of the United States

JAMES H. KOSTMAYER, JR. and ROBERT I. LAWSON,
Petitioners,

v.

DEPARTMENT OF TREASURY, JOHN W. MAGAW, DIRECTOR,
BUREAU OF ALCOHOL, TOBACCO & FIREARMS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether U.S. Const. amend. II creates a personal right in each citizen that shall not be infringed.

2. Whether 18 U.S.C. § 922(g)(1), which prohibits possession of a firearm by a convicted felon "in or affecting commerce," and § 925(c), which authorizes federal administrative relief from such a firearm disability, violate the Second, Ninth, and Tenth Amendments, the Commerce Clause (U.S. Const. Art. I, § 8, cl. 3), and principles of federalism, as applied to citizens who have been deprived of firearm possession, even though they have successfully completed federal sentences for non-violent felonies and their sovereign state of domicile has granted them full pardons restoring all their civil rights, specifically including the right to bear arms.

3. Whether Congress' *de facto* lifetime ban on intrastate possession of firearms by pardoned, non-violent citizens is abusive and unconstitutional.

LIST OF INTERESTED PERSONS AND RULE 29.6 NOTATION

The parties to the proceeding below were petitioners, James H. Kostmayer, Jr. and Robert I. Lawson, Jr., and respondent Department of Treasury, John W. Magaw, Director, Bureau of Alcohol, Tobacco & Firearms.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, James H. Kostmayer, Jr. and Robert I. Lawson, respectfully ask this Court to grant certiorari to review the final judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unreported opinion of the Fifth Circuit, No. 98-30365, is reprinted in the appendix hereto, pp. 1a-2a, *infra*. The underlying Judgment and Minute Entry of the United States District Court for the Eastern District of Louisiana, whose reasoning the Fifth Circuit adopted, are reprinted at pp. 3a-5a, *infra*.

JURISDICTION

The Fifth Circuit entered its judgment on April 9, 1999 (Appendix, 1a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case implicates U.S. Const. Art. I, § 8, cl. 3 (The Commerce Clause), U.S. Const. amends. II, IX, and X, 18 U.S.C. §§ 922(g)(1) and 925(c), 28 U.S.C. § 1361, Pub. L. No. 102-393, 1992 U.S.C.C.A.N. (106 Stat.), 1729, 1732, and 27 C.F.R. § 178.144(a) and (d). The pertinent texts of these provisions are set forth in the appendix at pp. 29a-33a, *infra*.

INTRODUCTION AND STATEMENT OF THE CASE

This petition affords the Court an excellent and long awaited opportunity to clarify the nature and scope of individual citizens' rights to possess firearms under the Second and Ninth Amendments. It further raises important issues of federalism under those amendments, the Tenth Amendment, and the Commerce Clause. Pursuant to its lawful police power, the State of Louisiana has issued full pardons to petitioners, who are non-violent federal felons who have served their sentences for tax offenses and who simply want to resume their hobbies of hunting within Louisiana. Their pardons restore their rights as citizens to possess firearms. But 18 U.S.C. § 922(g)(1) criminalizes the possession "in or affecting commerce" of firearms by convicted felons. And Congress and a federal agency have refused to act on petitioners' applications under 18 U.S.C. § 925(c) for relief from their firearm disabilities, thereby infringing on petitioners' constitutional rights. The courts below have failed to correctly address and resolve these far-reaching constitutional questions that affect not only these litigants

but all citizens who desire to lawfully possess firearms, as well as sovereign states who regulate their intrastate use. This Court can and should settle these issues now.

A. Factual Background

On January 5, 1994, the U.S. District Court for the Eastern District of Louisiana convicted petitioner James H. Kostmayer, Jr. on a plea of guilty of violating 18 U.S.C. § 371 (conspiracy to defraud the United States Government) and sentenced him to ten months in the custody of the Bureau of Prisons and three years of supervised probation. His offense related to failing to pay and report or to report accurately employer withholding tax information. The crime involved neither violence nor the use of a firearm. *Id.* Kostmayer's periods of probation and supervised release ended on December 3, 1997 [Appendix 6a-7a]. On October 11, 1995, upon the recommendation of the State Board of Pardons, the Governor of the State of Louisiana, granted ". . . restoration of full rights of citizenship, including the right to own, possess, receive, ship and transport firearms, and remission of all forfeitures resulting from such conviction, to James H. Kostmayer, Jr." [Appendix 9a-10a].

A federal statute, 18 U.S.C. § 922(g)(1), makes it unlawful for convicted felons to "possess in or affecting commerce, any firearm or ammunition." On July 22, 1997, Kostmayer filed an Application for Restoration of Firearms Privileges at the Bureau of Alcohol, Tobacco & Firearms of the U.S. Department of Treasury ("ATF") according to 18 U.S.C. § 925(c) and all relevant ATF regulations [Appendix 11a-12a].[1] ATF notified Kostmayer

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[1] 18 U.S.C. § 925(c) reads, in part:

> A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary for relief from the disabilities imposed

on September 11, 1997 that is would not process his application because Congress had prohibited ATF from spending any appropriated funds to investigate or act upon applications for relief from federal firearms disabilities [Appendix 13a-14a].[2]

> by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief will not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. . . .

ATF regulations at 27 C.F.R. 178.144(a) and (d) authorize the Director of ATF to grant relief to an applicant if the circumstances, his record, and his reputation "are such that the applicant will not be likely to act in a manner dangerous to public safety, and that the granting of the relief would not be contrary to the public interest." [Appendix 32a-33a].

[2] The Treasury, Postal Service and General Government Appropriations, Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729 (1992) ("Public Law 102-393, became effective on October 6, 1992. Title I of Pub. L. No. 102-393 appropriated sums for the Department of the Treasury and various Treasury agencies, including ATF, for the fiscal year ending September 30, 1993. The ATF appropriations language contained a specific proviso: "That none of the sums appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)." 1992 U.S.C.C.A.N. (106 Stat.) 1729, 1732 [Appendix 32a]. ATF's appropriations for fiscal years 1994-1998 have continued this prohibition of individual firearms relief applications. *See* Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 103-123, 1993 U.S.C.C.A.N. (107 Stat.) 1226, 1228-1229; Pub. L. No. 103-329, 1994 U.S.C.C.A.N. (108 Stat.) 2382, 2385; Pub. L. No. 104-52, 1995 U.S.C.C.A.N. (109 Stat. 468-471; Pub. L. No. 104-208, 1996 U.S.C.C.A.N. (110 Stat.) 3009-314, 3009-319; and Pub. L. No. 105-61, 1997 U.S.C.C.A.N. (111 Stat.) 1272, 1277.

Similarly, on December 15, 1993, petitioner Robert I. Lawson, Jr. was convicted in federal court in the Eastern District of Louisiana on his plea of guility of one violation of 26 U.S.C. § 7206(1) for submitting a false IRS Form 941. The district court sentenced him to a probationary period of two years. This offense likewise did not involve violence nor a crime involving the use of a firearm. At his sentencing, the district court agreed that Lawson's act was an "aberration." When his period of probation and supervised release ended on March 2, 1995, Lawson was discharged [Appendix 15a]. On November 27, 1995, the Governor of the State of Louisiana, upon the recommendation of the state Board of Pardons, granted ". . . a restoration of full rights of citizenship, including the right to own, possess, receive, ship and transport firearms, to Robert Lawson, and remission of all forfeitures resulting from this conviction. . . ." [Appendix 16a-17a].

On November 21, 1995, counsel for Lawson asked ATF for application forms "for relief from disability regarding his possession of firearms" [Appendix 18a-19a]. On February 26, 1996, ATF denied that request because of Public Law 104-52 [Appendix 20a-21a]. *See* Footnote 2, *supra.*

Both Kostmayer and Lawson are avid recreational hunters and outdoorsmen. Neither has ever trafficked in any narcotic or dangerous drug, joined any organized crime group, or engaged in any organized criminal activity. Kostmayer is in the construction business, and Lawson is a CPA. Both want to resume their traditional hobbies of hunting in Louisiana where they reside. The State of Louisiana has already restored all their full rights of citizenship, which necessarily include the rights to vote in all elections (state or federal), serve on state juries, possess firearms, and go hunting. The issuing of hunting licenses and gun permits, Kostmayer and Lawson assert,

is a function of the police powers of the State of Louisiana that the federal government cannot validly restrict and deny these petitioners under the Constitution and the specific facts of this case.

B. District Court Proceedings

Kostmayer and Lawson filed a Petition for Writ of Mandamus, or, in the Alternative, for Declaratory Judgment, in the United States District Court for the Eastern District of Louisiana, seeking to require respondent ATF to process their applications pursuant to 18 U.S.C. § 925(c), which vests authority in the Secretary of the Treasury to grant them relief from their so-called disabilities of being felons statutorily prohibited from possessing firearms [Appendix 22a-28a]. Petitioners asserted that they were entitled to mandamus or alternatively a declaratory judgment stating that:

(1) 18 U.S.C. § 925(c) is unconstitutional as applied to citizens who have successfully completed criminal sentences and who have received full and complete pardons by their sovereign states of domicile that specifically restored all civil rights, including the right to bear arms;

(2) The Second Amendment of the United States Constitution creates a personal right in each citizen that shall not be infringed, and 18 U.S.C. § 925(c) as applied to the recipient of a full pardon in such an infringement; and

(3) The provisions of 18 U.S.C. § 925(c) and 18 U.S.C. § 922(g)(1), which criminalizes possession of a firearm by a felon "in or affecting commerce," do not apply where petitioners' individual rights to bear arms are infringed.

Their petition was transferred to the Honorable Adrian G. Duplantier, the same federal judge who had accepted their guilty pleas and had imposed sentence upon them.

The United States filed a Motion and Incorporated Memorandum to Dismiss or, in the Alternative, for Summary Judgment, which petitioners opposed. Petitioners further filed their competing Motion for Summary Judgment, with a supporting memorandum and exhibits. Petitioners asserted that the federal regulatory scheme as applied to them was unconstitutional in violation of their personal rights under the Second Amendment, exceeded federal power under the Commerce Clause, and violated the spirit and concept of federalism because the federal government improperly injected itself into matters reserved to the sovereign states.

By Minute Entry entered on April 6, 1998, the district court granted the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment [Appendix 4a-5a]. The court ruled, in part, that Congress could restrict petitioners' right to possess firearms:

> While their arguments are interesting, I conclude that Congress has the power, if it so chooses, to provide as part of the punishment for a felony conviction that the offender may not thereafter possess a firearm for whatever period Congress may prescribe. I agree with plaintiffs that there appears to be no precedent establishing such authority on the part of Congress. However, neither does there appear to be any case law even hinting that Congress lacks such power.

Id.

On April 9, 1998, the district court entered judgment dismissing petitioners' suit with prejudice [Appendix 3a]. Petitioners filed a timely Notice of Appeal to the Fifth Circuit on April 14, 1998.

C. Fifth Circuit Proceedings

On appeal, petitioners reurged their arguments under the Second and Ninth Amendments, the Commerce

Clause, and principles of federalism. The Fifth Circuit affirmed [Appendix 1a-2a]. In a *per curiam* opinion entered on April 9, 1999, the court of appeals stated, "Having considered the briefs and oral arguments of counsel and pertinent parts of the record, and for essentially the reasons assigned by the district court in its order granting the United States' motion to dismiss and alternative motion for summary judgment filed April 6, 1998, the judgment appealed from is AFFIRMED" *Id.*

REASONS FOR GRANTING THE PETITION

With no history of violent crime or firearm abuse and with a single federal felony conviction related to submitting false withholding tax information to the IRS, each petitioner has received a full and complete pardon from the sovereign state of Louisiana. But, petitioners now confront a congressionally imposed roadblock in the form of an indeterminate and potentially lifetime statutory ban of never being able to possess a firearm and engage in their traditional sport of hunting in Louisiana. Congress has refused to permit ATF to process their applications for removal of their firearm disabilities.

This Court should grant certiorari to address the important constitutional questions that this case presents. First, the Court should define the nature and scope of the Second Amendment right to bear arms. This issue has been the subject of much debate and published case law on whether the right is personal to individual citizens or only resides collectively in the state as part of its right to maintain a militia. In this case, petitioners contend that Congress and ATF have violated their individual Second Amendment rights by restricting their lawful possession of firearms as pardoned, non-violent felons who simply want to hunt within their own state of domicile. This Court should resolve this issue to guide federal and

state judicial, legislative, and executive authorities, as well as individual citizens.

Second, this case squarely presents far-reaching questions of the balance of power between Congress and the sovereign states under our system of federalism. The State of Louisiana has restored all civil rights in these petitioners under its exclusive police power as a sovereign state. Any congressional scheme whereby a federal agency like the ATF is deemed the sole authority for "restoration of rights" is unconstitutional under the Second, Ninth, and Tenth Amendments. Any law by Congress or act of a federal agency prohibiting intrastate possession of a firearm by these petitioners exceeds the power granted to Congress under the Commerce Clause. It violates not only petitioners' personal constitutional rights reserved to the people but also the rights they derive from Louisiana's sovereign act in pardoning them and restoring their right to bear arms.

Third, such a *de facto* lifetime ban against possession of a firearm as part of a punishment for a felony conviction for a non-violent crime unrelated to firearm abuse exceeds Congress' penal authority. This penalty is grossly disproportionate to the crime involved in this case, especially where the sovereign state of their own domicile has pardoned these petitioners.

I. THE SECOND AMENDMENT CREATES A PERSONAL RIGHT IN EACH CITIZEN

The time is now ripe for this Court to squarely confront the issue whether the Second Amendment creates a personal right in favor of individual citizens. Sixty years ago, in *United States v. Miller*, 307 U.S. 174 (1939), this Court held that possession of a sawed-off double barrel twelve gauge shotgun could be the basis of a crime because "in the absence of any evidence tending to show

the possession or use [of such a weapon] at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." 307 U.S. at 178. But, as Justice Thomas observed over five decades later in his concurring opinion in *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 2384, 138 L.Ed.2d 914, 945, n.1 (1997), this Court in *Miller* ". . . did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment." *See also United States v. Warin*, 530 F.2d 103, 106 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976), recognizing that the Supreme Court in *Miller* did not intend to formulate a general rule on the Second Amendment but merely dealt with the facts of that case.

In *Printz v. United States*, cited above, this Court held unconstitutional that part of the Gun Control Act, 18 U.S.C. § 921, *et seq.*, and its 1993 Brady Act amendments, 18 U.S.C. § 922(s), *et seq.*, which commanded state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks. In his concurring opinion in *Printz*, Justice Thomas recognized the emerging view that the Second Amendment bestows substantive and personal rights on citizens, just as the First Amendment does:

> The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority. The First Amendment, for example, is fittingly celebrated for preventing Congress from "prohibiting the free exercise" of religion or "abridging the freedom of speech." The Second Amendment similarly appears to contain an express limitation on the government's authority. That Amendment provides: "[a] well regulated Militia, being necessary to the security

> of a free State, the right of the people to keep and bear arms, shall not be infringed." This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. *If, however, the Second Amendment is read to confer a personal right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections.* . . . Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic." 3 J. Story Commentaries § 1890, p. 746 (1833).

117 S.Ct. at 2384, 138 L.Ed.2d at 946-947 (footnotes omitted; emphasis supplied). Justice Thomas noted the existence of "an impressive array of historical evidence" and concluded that "a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right." *Id.*, fn. 2. This Court has further recognized that "there is a long tradition of widespread lawful gun ownership by private individuals in this country." *Staples v. United States*, 511 U.S. 600, 610 (1994). Nevertheless, courts of appeals have interpreted *United States v. Miller*, cited above, to hold that the Second Amendment creates only a "collective" right in the states to keep and bear arms rather than an individual right. *See, e.g., Hickman v. Block*, 81 F.3d 98, 100-01 (9th Cir.), *cert. denied*, 519 U.S. 912 (1996), *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir.), *cert. denied*, 516 U.S. 813 (1995). *Cf., United States v. Emerson*, —— F. Supp. 2d ——, 1999 WL 198865, 1999 U.S. Dist. LEXIS 4122 (N.D.Tex. 1999) (conducting exhaustive "textual" and "historical" analyses and concluding "that the right to keep and bear

arms is a personal right retained by the people as opposed to a collective right held by the States."). This case now presents this Court with the opportunity to define the nature and scope of the right that the Second Amendment bestows.

In this case, the government has asserted that "possession of firearms by a person convicted of a felony is not a right but a privilege subject to government regulation," citing *Lewis v. United States*, 445 U.S. 55, 66 (1980) [R. 115-116, Doc. 3]. But *Lewis* is not conclusive on that point and does not authorize the federal government to withhold the right to bear arms from every convicted felon regardless of the non-violent nature of his crime or his subsequent pardon by state authority. *Lewis* merely held that a defendant's prior state court felony conviction, even though subject to collateral attack on grounds that it violated the defendant's constitutional rights to counsel, could still serve as a predicate for his subsequent conviction under 18 U.S.C. App. § 1202(a)(1), which prohibits convicted felons from possessing firearms shipped in interstate commerce. *Lewis* held that such an interpretation did not violate the Sixth Amendment or the concept of equal protection under the due process clause of the Fifth Amendment. Indeed, *Lewis* and the cases cited therein recognized that the Second Amendment reflects a "right," as opposed to a privilege, and does not necessarily ban all prohibitions concerning possession of firearms:

> These legislative restrictions [allowing *prosecution* of felons with weapons] on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. *See United States v. Miller*, 307 U.S. 174, 178, 83 L.Ed. 1206, 59 S.Ct. 816 (1939) (the Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable

> relationship to the preservation or efficiency of a well-regulated militia"); *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288, 1290, n.5 (CA 7 1974); *United States v. Johnson*, 497 F.2d 548 (CA 4 1974); *Cody v. United States*, 460 F.2d 34 (CA 8), *cert. denied*, 409 U.S. 1010, 34 L.Ed.2d 303, 93 S.Ct. 454 (1972) (the latter three cases holding, respectively, that § 1202(a)(1), § 922(g), and § 922(a)(6) do not violate the Second Amendment). 445 U.S. at 65, n.8.

The jurisprudence that this Court cited above in *Lewis* looked to the facts presented and nature of the weapon involved in determining whether the federal regulation infringes on the Second Amendment. As noted earlier, *Miller* did not attempt to define or construe the nature of the substantive right that the Second Amendment protects.

The three intermediate appellate decisions that this Court cited in *Lewis* did not resolve the issue that this petition presents concerning the nature of personal rights under the Second Amendment. In *United States v. Three Winchester 30-30 Caliber Level Action Carbines*, 504 F.2d 1288, 1290, n.5 (7th Cir. 1974), the Seventh Circuit merely stated that the arguments in that case based on the Second Amendment, the First Amendment's prohibition of bills of attainder, and the Fourteenth Amendment's due process clause "were appropriately rejected" and were not raised on appeal. In *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974), the Fourth Circuit adopted *United States v. Miller* and stated that ". . . the Second Amendment only confers a collective right of keeping and bearing arms which bear a 'reasonable relationship to the preservation or efficiency of a well-regulated militia'." In *Cody v. United States*, 460 F.2d 34, 36-37 (8th Cir.), *cert. denied*, 409 U.S. 1010

(1972), the Eighth Circuit cited *Miller* and stated ". . . it has been settled that the Second Amendment is not an *absolute* bar to congressional regulation of the use or possession of firearms." (Emphasis supplied). But none of those circuit court decisions nor *Miller* defines exactly what is the scope and extent of the personal right that the Second Amendment confers on the citizenry.

In *United States v. Emerson*, —— F. Supp. —— 1999 WL 198865, 1999 U.S. Dist. LEXIS 4122 (N.D.Tex. 1999), a Texas federal district court recently recognized that the Second amendment bestows a personal right on the people, not merely a collective right in the state. The statute found unconstitutional in *Emerson* was 18 U.S.C. § 922(g)(8), which criminalized possession of a firearm by a person subject to a domestic restraining order. The *Emerson* court noted that the statute had no requirement for a particularized finding of a threat of violence. 1999 WL 198865 at p. 11. In *dicta*, the court in *Emerson* distinguished the felon-in-possession statute at issue in this case (which also has no requirement for a particularized finding as to possible violence) by stating ". . . once an individual is convicted of a felony, he has by his criminal conduct taken himself outside the class of law-abiding citizens who enjoy full exercise of their civil rights." *Id.*, p. 9. But that exception does not apply in the case at bar. The sovereign state of Louisiana has brought Kostmayer and Lawson back "inside the class of law-abiding citizens who enjoy full exercise of their civil rights"—something neither Congress nor an appointed officer of the Executive Branch can do.

The Second Amendment indeed creates a personal right of individual citizens to bear arms. Like many other personal constitutional rights, it can, under appropriate and constitutional conditions, be the subject of some statutory limitation. For example, freedom of speech under

the First Amendment can be restricted by punishing the proverbial scream of "Fire!" in a theatre, threats to kill the President, or slanderous words spoken with actual malice. But that does not means that a constitutional right is nonexistent or that there is only a "privilege" to speak. It likewise does not mean Congress can exercise "prior restraint." The remedy is not prior restraint but punishment for abuse.

No such abuse is present here to justify banning petitioners from lawful, intrastate possession of hunting rifles. Kostmayer and Lawson have committed no crime of violence, and the sovereign State of Louisiana already has made a formal decision that indeed they may be trusted to possess firearms without becoming a threat to society. No rational basis exists for concluding that a construction executive and a CPA endanger society when hunting ducks. Congress and ATF have no valid constitutional ground, through 18 U.S.C. § 925(c), to infringe upon *these* petitioners' Constitutional rights by restricting their Second Amendment right and freedom to bear arms under these circumstances. This case affords this Court an ideal opportunity to define the parameters of the personal right to bear arms under the Second Amendment, a definition that Congress, the Executive, the Judiciary, and the citizenry sorely need.

II. FEDERAL STATUTES PROHIBITING POSSESSION OF FIREARMS BY STATE-PARDONED NONVIOLENT FEDERAL FELONS ARE UNCONSTITUTIONAL AS A VIOLATION OF FEDERALISM, THE SECOND, NINTH, AND TENTH AMENDMENTS, AND THE COMMERCE CLAUSE

This Court should further grant certiorari in this case to address important constitutional questions concerning the balance of power between Congress and the sovereign states. As this Court has recently recognized, the

Constitution's system of federalism requires Congress to accord the States the respect and dignity due them as residuary sovereigns and joint participants in the Nation's governance. *Alden v. Maine*, No. 98-436, —— U.S. —— (1999), 1999 WL 412617, decided June 23, 1999. Under our "federalist structure of joint sovereigns" the states retain substantial authority in a balance of power with the federal government that "preserves to the people numerous advantages." *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991). This Court has further recognized that the Framers used the phrase "the people" as "a term of art employed in select parts of the Constitution," including the Second Amendment ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."), the Ninth Amendment ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."), and the Tenth Amendment ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). *United States v. Verdugo-Urquidez*, 494 U.S. 259, 262 (1990). This case implicates not only the individual rights that petitioners retain as members of "the people" under these three constitutional amendments, but also the rights that the sovereign State of Louisiana has granted them through its police power by pardoning them and reinstating their rights to lawfully possess firearms.

In addition to the individual citizens' personal rights to bear arms under the Second Amendment discussed above, this case implicate the Ninth Amendment, the constitutional right of the people to retain unenumerated powers. Under facts different from those present here, the Fifth Circuit in *United States v. Broussard*, 80 F.3d

1025 (5th Cir.), *cert. denied*, 519 U.S. 906 (1996), was faced with a claim that the defendant's sentence enhancement for possession of a firearm chilled his constitutional right to possess a firearm. Although it was "not persuaded to discover or declare a new constittuional right to possess weapons under the Ninth Amendment on the basis of [the defendant's] proffered 'authority' " the court of appeals noted that neither the Fifth Circuit nor the Supreme Court had ever addressed the issue of whether the Ninth Amendment encompasses a right to possess firearms. *Id.* at 1041 and n.11. This case now squarely presents that issue for this Court to resolve.

Congress has further violated the Tenth Amendment and has exceeded its powers under the Commerce Clause in this case by enacting 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 925(c) to criminalize the possession of hunting weapons by Kostmayer and Lawson and to prohibit ATF from removing their firearm disabilities. Petitioners enjoy a lawful right to bear arms because the Governor of Louisiana has pardoned them. The state of their domicile has seen fit to do so under a power reserved to the State and the people and not delegated to Congress under our system of federalism.

"Upon the recommendation of the Honorable Board of Pardons [of Louisiana]," Kostmayer and Lawson each received from the Governor of the State of Louisiana "a restoration of full rights of citizenship, including the right to own, possess, receive, ship and transport firearms, and remission of all forfeitures resulting from" their specific convictions. This restoration includes the right to vote in state and federal elections,[3] the right to hold state office,

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[3] The individual States establish qualifications for voting for not only state officers but also for congressional and national elections. U.S. Const., Art. I, § 2, cl. 1; U.S. Const. amend. XVII; *Katzenbach v. Morgan*, 384 U.S. 641, 647 (1966); *Ventre v. Ryder*, 176 F. Supp.

and, by its express terms, the right to bear arms. Where the sovereign State of Louisiana has exercised its police power by specifically reinstating petitioners' rights to possess firearms and has restored them to a state of legal grace, the federal government cannot, consistent with the Second, Ninth, and Tenth Amendments and principles of federalism, deprive them of those benefits. The people's right under these Amendments to possess arms is a limitation on, not a grant of power to, the federal government. By refusing to act on petitioners' requests to remove their firearm disabilities, Congress and ATF unconstitutionally deprive petitioners of those same rights that the state of their own domicile has given them.

Kostmayer and Lawson are aware that 18 U.S.C. § 921 (20) defines the term "crime punishable by imprisonment for a term exceeding one year" and provides that "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." Petitioners further recognize that the State of Louisiana pardon may not eliminate the conviction for purposes of 18 U.S.C. § 921. Federal law rather than state law controls the definition of what constitutes a conviction and does not support the choice of law principle for the restoration of civil rights following a conviction. *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983). But that principle is irrelevant to this case. Petitioners do not contend that the State of Louisiana has pardoned or eliminated their federal convictions. Rather, despite petitioners' extant federal convictions, the Second, Ninth, and Tenth Amend-

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90 (W.D. La. 1959). *See also La Rouche v. Guzzi*, 417 F. Supp. 444 (D. Mass. 1976); *U.S. v. State of Ala.*, 252 F. Supp. 95 (M.D. Ala. 1966). Clearly, Kostmayer and Lawson's rights to vote in state and federal elections have been restored. The right to bear arms is also a state issue.

ments prohibit prior restraints or restrictions on the possession of firearms by a law-abiding citizens because such rights are a function of the police power of the state. Attempts to prohibit such possession, as discussed below, further exceed Congress' commerce power. In other words, the existence of the conviction is irrelevant if the individual has satisfactorily completed his sentence and has returned to law-abiding society in a legal state of grace, as Kostmayer and Lawson have in this case.

In *Beecham v. United States,* 511 U.S. 368, 128 L.Ed. 2d 383, 114 S.Ct. 1669 (1994), the Court stated ". . . that petitioners can take advantage of § 921(a)(20) only if they have had their civil rights restored under federal law. . . ." 128 L.Ed.2d at 390. However, this Honorable Court's sole footnote in that case made the following observation:

> We express no opinion on whether a federal felon cannot have his civil rights restored under federal law. This is a complicated question, one which involves the interpretation of the federal law relating to federal civil rights, *see* U.S. Const., Art. 1, § 2, cl. 1 (right to vote for Representatives); US Const. Amdt. XVII (right to vote for Senators); 28 U.S.C. § 1865 [28 U.S.C.S. § 1865] (right to serve on a jury); consideration of the possible relevance of 18 U.S.C. § 925(c) (1988 ed., Supp. IV) [18 U.S.C.S. § 925(c)], which allows the Secretary of the Treasury to grant relief from the disability imposed by § 922(g); and the determination whether civil rights must be restored by an affirmative act of a Government official, *see United States v. Ramos,* 961 F.2d 1003, 1008 (C.A. 1), *cert. denied,* 506 U.S. 934, 121 L.Ed.2d 277, 113 S.Ct. 364 (1992), or whether they may be restored automatically by operation of law, *see United States v. Hall,* 20 F.3d 1066 (C.A. 10 1994). We do not address these matters today.

128 L.Ed.2d at 389. This Court should now address that question in this case where a sovereign state has restored petitioners' right to possess firearms, one of the rights expressly reserved to the "people" under the Constitution, but Congress and ATF refuse to relieve them of their firearm disabilities.

The Commerce Clause does not empower Congress and ATF to deny petitioners' rights to lawfully possess hunting rifles within Louisiana in this case. In *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), this Court examined the right to bear arms and Congress' attempts to restrict that right through its powers under the Commerce Clause. That case involved the Gun-Free School Zones Amendment to the Gun Control Act (18 U.S.C. § 922(q), *et seq.*), which prohibited possession of a firearm in a place the individual knows or has reasonable cause to believe is a school zone. Congress purportedly enacted that statute under its authority to regulate commerce among the separate states pursuant to U.S. Const., Art. I, § 8, c. 3 (the Commerce Clause). This Court analyzed the power of Congress to enact 18 U.S.C. § 922(q) under three traditional Commerce Clause bases. First, this Court ruled that § 922(q) was not a regulation of the use of the channels of interstate commerce, nor was it an attempt to prohibit the interstate transportation of a commodity in the channels of interstate commerce. 131 L.Ed.2d at 636-637. Second, § 922 (q) could not be justified as legislation whereby Congress had sought to protect an instrumentality of interstate commerce or a thing of interstate commerce. *Id.* at 637-638. Finally, this Court ruled that § 922(q) is a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms:

> Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regula-

> tory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce. *Id.* at 638-639.

Concurring in the majority's detailed history of federalism in *Lopez*, Mr. Justice Thomas presaged his later comments (quoted above) in *Printz v. United States:*

> But it seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.

131 L.Ed.2d at 654. The Commerce Clause provides no basis for denying petitioners relief from their firearm disabilities in this case, where the State of Louisiana has pardoned them and has restored their right to lawfully possess arms within the state.

In *United States v. Rawls*, 85 F.3d 240 (5th Cir. 1996), the Fifth Circuit ruled that neither the holding nor reasoning in *Lopez* constitutionally invalidated a conviction under 18 U.S.C. § 922(g)(1), which makes it unlawful for a convicted felon "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition" and which has a specific interstate commerce element. But, the case at bar does not present a felon charged with possessing a weapon, but

rather felons who have completed their sentences, who have received pardons from their state of domicile, and who simply want to apply for removal of their statutory disabilities to possess firearms for lawful recreational use within Louisiana. *Lopez* invalidates a regulatory scheme that does not specifically state an interstate commerce element and that unconstitutionally prohibits current law-abiding citizens from possession of a firearm. The regulatory scheme at issue here is invalid under *Lopez*. In the case at bar, Congress and ATF have no nexus or jurisdictional basis in interstate commerce to prohibit petitioners' intrastate possession of firearms and deny them access to statutory relief from their firearm-posession-disability to hunt in Louisiana. *See also United States v. Wright*, 117 F.3d 1265, 1270 (11th Cir.), *cert. denied*, 118 S.Ct. 584 (1997), *vacated in part on other grounds*, 133 F.3d 1412 (11th Cir.), *cert. denied*, 119 S.Ct. 217 (1998), holding that a total ban on machine guns under 18 U.S.C. § 922(o) would have a substantial effect on interstate commerce, but could not be justified as a regulation of channels or things in interstate commerce. 117 F.3d at 1270.

Kostmayer and Lawson are not asking that their criminal convictions be set aside. They merely assert that Congress and the ATF exceed the Commerce Clause and otherwise violate the Second, Ninth, and Tenth Amendments and principles of federalism through a regulatory scheme that requires federal permission to possess a gun for intrastate purposes where their sovereign state of domicile has specifically granted them that right of possession. The Court should grant certiorari to address these far-reaching issues that deeply affect our federalist system of government.

III. CONGRESS' *DE FACTO* LIFETIME BAN ON POSSESSION OF FIREARMS BY PARDONED, NONVIOLENT CITIZENS IS ABUSIVE IN THIS CASE

Kostmayer and Lawson further submit that a *de facto* lifetime ban on their possession of firearms contained in 18 U.S.C. § 922(g), either alone or together with Congress' subsequent withdrawal of relief from lifetime disabilities formerly available by 18 U.S.C. § 925(c), is unconstitutional as applied to persons whose only transgression was filing false employer withholding tax forms and who have no history of violence or weapon abuse. A lifetime or indeterminate prohibition is grossly disproportionate to the crime charged, regardless of how one classifies the "right" to possess a firearm. In this case, it lacks any rational basis and exceeds Congress' penal authority.

Although no decisions exist condemning this lifetime or indeterminate ban, cases discussing conditions for supervised release (which supervision has terminated for petitioners in this case) are instructive. The tests for the validity of probation conditions, even where preferred rights are affected, are whether the limitations are primarily designed to affect rehabilitation of the probationer or are properly issued to ensure protection of the public, and whether these conditions are reasonably related to those purposes.

In *United States v. Voda*, 994 F.2d 149 (5th Cir. 1993), the Fifth Circuit held that the sentencing court had abused its discretion in imposing a firearm prohibition as a condition of probation for a defendant who was convicted of a misdemeanor offense of negligently discharging a pollutant. The court ruled that neither the charged offense nor the defendant's conduct had any relevance to the use or possession of a firearm. Further, the presentence investigation report did not indicate that the de-

fendant had a tendency to violence or to an abuse of firearms, or that he posed any danger whatsoever to the public. *See also United States v. Doe*, 79 F.3d 1309 (2d Cir. 1996), (an order requiring a defendant (who had pleaded guilty to aiding and abetting the preparation and filing of a false income tax return) to notify clients of his conviction as a condition of probation was unsupported by the record which did not show that such notification was reasonably necessary to protect the public or was a minimal occupation restriction, especially since the defendant had pled guilty only to a single offense and had no criminal history); *United States v. Friedberg*, 78 F.3d 94 (2d Cir. 1996) (a restriction on travel can be a valid condition of probation; however, that restriction must be reasonably related to rehabilitating the defendant and protecting the public); *United States v. Turner*, 44 F.3d 900 (10th Cir.), *cert. denied*, 515 U.S. 1104 (1995) (incidental restrictions of First Amendment rights to freedom of speech and association are permissible if reasonably necessary to accomplish the essential needs of state and public order); *United States v. Eyler*, 67 F.3d 1386 (9th Cir. 1995) (conditioning supervised release from imprisonment on charges of unlawful possession of firearms upon repayment of attorney's fees under the Criminal Justice Act was error in that the payment of fees was not related to the defendant's possession of firearms, had no rehabilitation effect, and did not provide any deterrence, protect the public from future crimes, or provide the defendant with any training or treatment); and *United States v. Prendergast*, 979 F.2d 1289 (8th Cir. 1992) (special conditions of supervised release imposed on a mail fraud defendant prohibiting him from purchasing, possessing, and using any alcohol and subjecting him to warrantless searches for alcohol and drugs at any time, were an abuse of discretion where there was no evidence that the defendant suffered from alcoholism, that alcohol

use contributed to the commission of offenses, or that the defendant used fraud proceeds for drug activity).

As the decisions cited above demonstrate by analogy, the district court and the court of appeals erred in this case by concluding that Congress has authority to deny the possession of firearms to anyone who has been released from all supervision on a conviction not related in any way to firearms abuse and whose sovereign state has restored his right to bear arms under a full pardon. Congress and ATF have exceeded their authority in this case by imposing a *de facto* lifetime ban on possession of firearms on Kostmayer and Lawson, who are non-violent and pose no threat to society by hunting.

VI. PETITIONERS ARE ENTITLED TO A WRIT OF MANDAMUS OR DECLARATORY RELIEF

Pursuant to 28 U.S.C. § 1361, "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or agency thereof to perform a duty owed to the plaintiff." Mandamus is only available under 28 U.S.C. § 1361 when (1) the petitioner demonstrates a clear right to the relief sought, (2) the defendant official or agency owes a specific duty to the petitioner, and (3) no other adequate remedy is available to the petitioner. *Rush v. Parham*, 625 F.2d 1150, 1154 (5th Cir. 1980). Only where there has been a showing of a violation of an agency's authority or a "manifest infringement of substantial rights irremediable by the statutorily-prescribed method of review" should a court disregard the prescribed congressional scheme. *Nader v. Volpe*, 466 F.2d 261, 266 (D.C. Cir. 1972).

In view of the judicial restraint necessary to avoid declaring a statute unconstitutional when other relief may be possible, mandamus is appropriate in this case since

(1) Kostmayer and Lawson have demonstrated a clear right to the relief sought in light of these grave constitutional issues, (2) the defendant agency owes a specific duty to petitioners *not* to violate the U.S. Constitution, and (3) there is no other "adequate" remedy available to the petitioners, save actually possessing a weapon in violation of the letter of the unconstitutional statute and thereafter testing the statute's constitutionality as a scofflaw. The writ in this case could be crafted in such a manner merely ordering the Director of ATF to issue the required certificate pursuant to 18 U.S.C. § 925(c) without any investigation or other expenditure of funds since no investigation or expenditure of funds is required for the signing of a piece of paper that merely recognizes petitioners' constitutional rights and the prior pardon by the State of Louisiana.

In lieu of mandamus, and abandoning efforts to save a constitutionally infirm statute, declaratory judgment is appropriate relief:

> In the federal system, when no specific method of obtaining judicial review of final orders by administrative agencies is prescribed by statute, an aggrieved party can still obtain judicial review, by bringing a declaratory or injunctive suit against the agency. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 662 (7th Cir. 1995).

Rekhi v. Wildwood Industries, Inc., 61 F.3d 1313, 1320 (7th Cir. 1995). Under this alternative, an order could issue declaring that 18 U.S.C. § 922(g) and 18 U.S.C. § 925(c), as they relate to mere intrastate possession of firearms, are unconstitutional as applied to non-violent federal felons who have completed their sentences *and* who have received full and complete pardons by their sov-

ereign state of residence restoring their civil rights and specifically restoring the right to bear arms. Such rights are attributes of state citizenry that the federal government cannot infringe in this case. They bear no resemblance to a matter regulatable by the Commerce Clause. On certiorari, this Court should grant mandamus or declaratory relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 8, 1999

APPENDICES

APPENDIX A

[Filed Apr. 9, 1999]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30355

JAMES H. KOSTMAYER, JR.;
ROBERT I. LAWSON, JR.,
Plaintiffs-Appellants,

versus

DEPARTMENT OF TREASURY,
JOHN W. MAGAW, Director,
Bureau of Alcohol, Tobacco & Firearms,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 98-CV-350-H

Before REAVLEY, POLITZ, and SMITH, Circuit Judges.

PER CURIAM: *

James J. Kostmayer, Jr., and Robert I. Lawson, Jr., appeal the district court's grant of the defendant-appellee's

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

motion to dismiss or, in the alternative, for summary judgment, challenging the constitutionality of 18 U.S.C. § 922(g)(1) and § 925(c), as well as the denial of their request for a writ of mandamus or a declaratory judgment. Having considered the briefs and oral argument of counsel and pertinent parts of the record, and for essentially the reasons assigned by the district court in its order granting the United States' motion to dismiss and alternative motion for summary judgment filed April 6, 1998, the judgment appealed is AFFIRMED.

APPENDIX B

[Filed Apr. 9, 1998]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No. 98-0350

SECTION "H"

JAMES H. KOSTMAYER, JR. and
ROBERT I. LAWSON

versus

JOHN W. MAGAW, DIRECTOR BUREAU OF
ALCOHOL, TOBACCO AND FIREARMS,
UNITED STATES DEPARTMENT OF THE TREASURY

JUDGMENT

Considering the minute entry dated April 3, 1998, filed herein,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendant John W. Magaw, Director Bureau of Alcohol, Tobacco and Firearms, United States Department of the Treasury, and against plaintiffs James H. Kostmayer, Jr. and Robert I. Lawson, Jr., dismissing plaintiffs' suit with prejudice at their cost.

New Orleans, Louisiana, this 7th day of April, 1998.

/s/ Adrian G. Duplantier
United States District Judge

Date of Entry Apr. 9, 1998

APPENDIX C

[Filed Apr. 6, 1998]

Minute Entry
Duplantier, J.
April 3, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 98-0350

SECTION "H"

JAMES H. KOSTMAYER, JR. and
ROBERT I LAWSON, JR.

versus

JOHN MAGAW, DIRECTOR BUREAU OF
ALCOHOL, TOBACCO AND FIREARMS,
UNITED STATES DEPARTMENT OF THE TREASURY

The motion to dismiss or in the alternative for summary judgment filed on behalf of the United States was considered this date on memoranda. For the following reasons the motion is GRANTED.

Insofar as plaintiff seeks relief from the firearm disabilities created by 18 U.S.C. 922(g)(1) through an order directing the Bureau of Alcohol, Tobacco and Firearms to grant petitioners' applications for relief from those disabilities, this court lacks jurisdiction. *United States v. McGill*, 74 F.3d 64 (5th Cir), *cert. denied*, 117 S.Ct. 77 (1996).

I do have jurisdiction over petitioner's alternative cause of action, which seeks a declaration that 18 U.S.C. 922(g)(1) is unconstitutional as applied to "law-abiding convicted felons who have completed their sentence, or at least . . . law-abiding convicted felons who have completed their sentence and who have also received a full pardon by their sovereign state of residence, which pardon express [sic] a specific right to possess firearms." Plaintiffs' Motion for Summary Judgment, p. 3-4.

I have carefully reviewed plaintiffs' arguments in support of their contention that the statute as applied to them is unconstitutional. Plaintiffs cite no authority to support that contention, and I have found none. While their arguments are interesting, I conclude that Congress has the power, if it so chooses, to provide as part of the punishment for a felony conviction that the offender may not thereafter possess a firearm for whatever period Congress may prescribe. I agree with plaintiffs that there appears to be no precedent establishing such authority on the part of Congress. However, neither does there appear to be any case law even hinting that Congress lacks such power. It is unnecessary to write at length on this issue, because it is a virtual certainty that any decision I render will be appealed. Indeed, plaintiffs' interests are best served if an appealable judgment is entered without further delay.

I do note, however, that it is irrelevant that plaintiffs have each received a pardon from the governor of Louisiana restoring their civil rights, including the right to bear arms. A state pardon cannot relieve an individual of the punitive effects of a federal conviction; otherwise, a governor could release a federal prisoner from confinement by granting a pardon.

/s/ Adrian G. Duplantier

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Criminal Action Number: 93-360

SECTION: H

UNITED STATES OF AMERICA

versus

JAMES H. KOSTMAYER, JR.

Wednesday, December 3, 1997 11 AM
JUDGE ADRIAN J. DUPLANTIER

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1. RULE TO REVOKE SUPERVISED RELEASE
2. MOTION TO CLARIFY TERMS OF SUPERVISED RELEASE

Court begins at 11:10 a.m.
Case called.
All present and ready.
Government's witness: Gregory J. Walters, sworn and testified.
After a brief recess the parties inform the Court that an agreement has been reached.
The Court orders the Rule to Revoke Supervised Release dismissed.

The motion to clarify the terms of supervised release is dismissed as moot.
Defendant's supervised release terminates this date.
Court adjourns at 11:30 a.m.

Date of Entry Dec. 4, 1997

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
PROBATION OFFICE

JILL N. BENOIT
Chief Probation Officer

December 4, 1997

Mr. James Kostmayer
107 Twin Oaks Drive
Slidell, Louisiana 70461

RE: TERMINATION OF SUPERVISION

Dear Mr. Kostmayer:

You are hereby notified that your period of active supervision has been terminated as of December 3, 1997. It will not be necessary to submit future reports to this office.

If you have any questions, pleaset contact my office.

Sincerely,

/s/ Patrick R. Williams
PATRICK R. WILLIAMS
U. S. Probation Officer

PRW/ds

APPENDIX F

STATE OF LOUISIANA

EXECUTIVE DEPARTMENT

TO WHOM IT MAY CONCERN:

Whereas, At a session of the Honorable the United States District Court in and for the Eastern District of Louisiana, held on the 5th day of January, 1994 JAMES H. KOSTMAYER, JR. was tried and convicted of the crimes of Vio. of Title and Section 18USC 371 (Conspiring to defraud the United States Government and for said offense was sentenced by His Honor, the Judge of said court, to ten (10) months in the custody of the Bureau of Prison, and three (3) years released supervision.

And Whereas, upon the recommendation of the Honorable Board of Pardons, I have thought proper to grant a restoration of full rights of citizenship, including the right to own, possess, receive, ship and transport firearms, and transport firearms, and remission of all forfeitures resulting from such conviction, to James H. Kostmayer, Jr.

Now, Therefore, I, EDWIN EDWARDS, Governor of the State of Louisiana by virtue of the powers vested in me by the Constitution, do hereby grant a restoration of full rights of citizenship, including the right to own, possess, receive, ship and transport firearms, and remission of all forfeitures resulting from such conviction, to James H. Kostmayer, Jr.,

and do hereby direct you to act accordingly.

and for so doing this shall be your sufficient warrant and authority.

Given under my signature and the Great Seal of the State of Louisiana at the City of Baton Rouge, this 11th day of October, A.D. 1995

/s/ Edwin Edwards
Governor

By The Governor:

/s/ Fox McKeithen
Secretary of State

APPENDIX G

HUNTON & WILLIAMS
1900 K Street N.W.
Washington, D.C. 20006-1109
Telephone (202) 955-1500

July 22, 1997

Ms. Vivian Pena
Restoration Supervisor,
United States Bureau of Alcohol,
Tobacco and Firearms
P.O. Box 50220, Tech World Post Office
Washington, D.C. 20091

Re: *James H. Kostmayer*

Dear Ms. Pena:

We represent James H. Kostmayer, a resident of the State of Louisiana, who is seeking restoration of federal firearms privileges. In accordance with ATF restoration procedures, the following application materials are enclosed on behalf of Mr. Kostmayer:

(1) Application form, completed in triplicate;

(2) Three letters of reference;

(3) Two sets of fingerprints;

(4) Authorization for release of information; and

(5) Copy of full pardon granted by the State of Louisiana.

Should you need any additional information, please do not hesitate to call.

Sincerely,

/s/ Lara K. Shelesky
LARA K. SHELESKY

Enclosures
cc: Mr. James H. Kostmayer

APPENDIX H

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
Washington, DC 20226

[Sep. 11, 1997]

E:CE:F:F:VCP
3319

Ms. Lara K. Shelesky
Attorney at Law
1900 K Street, NW.
Washington, DC 20006-1109

Dear Ms. Shelesky:

This is in reference to the recent application for restoration of Federal firearms privileges you submitted to the Bureau of Alcohol, Tobacco and Firearms (ATF) on behalf of your client, Mr. James H. Kostmayer.

Under the provisions of the Gun Control Act of 1968, convicted felons and certain other persons are prohibited from possessing firearms. (See 18 U.S.C. section 922(g).) This Act, however, provides the Secretary of the Treasury with the authority to grant relief from this disability where the Secretary determines that the person is not likely to act in a manner dangerous to the public safety. (See 18 U.S.C. section 925(c).)

Since October 1992, however, ATF's annual appropriation has prohibited the expending of any funds to investigate or act upon applications for relief from Federal firearms disabilities. This restriction was retained in Pub. L. No. 104-208, 110 Stat. 3009, containing ATF's appropriations for 1997. As long as this provision is included in ATF's appropriations legislation, ATF cannot act upon applications for restoration of Federal firearms

privileges as submitted by individuals. In view of the foregoing restriction, we cannot act upon Mr. Kostmayer's application at this time. Therefore, we are returning the application and supporting documentation.

We recommend that you or Mr. Kostmayer contact our office about obtaining restoration of Federal firearms privileges if and when Congress acts to remove the restriction currently imposed. The address is as follows: Bureau of Alcohol, Tobacco and Firearms, P.O. Box 50220, Tech World Post Office, Washington, DC 20091, ATTN: Restoration Section.

Furthermore, the restriction contained in Pub. L. No. 104-208 does not change Mr. Kostmayer's status as a prohibited person. He is still prohibited from possessing, receiving, transporting, or shipping firearms under Federal law.

Also, we should further advise you that notwithstanding the restriction in ATF's appropriations, restoration would not ordinarily be granted to a person who is on probation or parole or who has not been discharged from supervision for a period of at least 2 years unless a compelling need can be established, for example, if the applicant's ability to earn a livelihood is directly dependent upon gaining restoration, we would consider this a compelling need and conduct the appropriate investigation. (See 27 C.F.R. section 178.144(d).) The desire to hunt does not constitute a compelling need.

We trust this has been responsive to your letter. If further assistance is required, please contact our Restoration Section at 202-927-8040.

Sincerely yours,

DALE L. ARMSTRONG
Section Chief
Firearms Branch

Enclosures

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Crim. No. 93-360 H

UNITED STATES OF AMERICA

v.

ROBERT LAWSON

On December 15, 1993 the above named was placed on supervised release for a period of *two* years. He has complied with the rules and regulations of supervised release and is no longer in need of supervised release. It is accordingly recommended that he be discharged from supervised release.

Respectfully submitted,

/s/ Kathy M. Mayfield
KATHY M. MAYFIELD
U. S. Probation Officer

ORDER OF THE COURT

Pursuant to the above report, it is ordered that the defendant is discharged from supervised release and that the proceedings in the case be terminated.

Dated this 2nd day of March, 1995.

/s/ [Illegible]
United States District Judge

Date of Entry Mar. 3, 1995

APPENDIX J

STATE OF LOUISIANA

EXECUTIVE DEPARTMENT

TO WHOM IT MAY CONCERN:

Whereas, At a session of the Honorable the United States District Court, Eastern District of Louisiana, held on the 15th day of December, 1993 ROBERT LAWSON was tried and convicted of the crimes of false statements and for said offense was sentenced by His Honor, the Judge of said court, to two (2) years probation supervised by the United States probation officer.

And Whereas, upon the recommendation of the Honorable Board of Pardons, I have thought proper to grant a restoration of full rights of citizenship, including the right to own, possess, receive, ship and transport firearms, to Robert Lawson and remission of all forfeitures resulting from this conviction.

Now, Therefore, I, EDWIN W. EDWARDS, Governor of the State of Louisiana by virtue of the powers vested in me by the Constitution, do hereby grant a restoration of full rights of citizenship, including the right to own, possess, receive, ship and transport firearms, to Robert Lawson and remission of all forfeitures resulting from this conviction.

and do hereby direct you to act accordingly.

and for so doing this shall be your sufficient warrant and authority.

[State Seal]

Given under my signature and the Great Seal of the State of Louisiana, at the City of Baton Rouge, this 27th day of November, A.D. 1995

/s/ Edwin Edwards
Governor

By The Governor:

/s/ Fox McKeithen
Secretary of State

APPENDIX K

HABANS, BOLOGNA & CARRIERE
A Professional Law Corporation
Suite 2323
1515 Poydras Street
New Orleans, Louisiana 70112-3723

(504) 524-2323

November 21, 1995

Bureau of Alcohol, Tobacco and Firearms
650 Massachusetts Ave., Room 7410
Washington, DC 20226

RE: Application for Relief from Disability in Order to Possess Firearms
Proposed Applicant: Robert I. Lawson, Jr.
Our File No. 90-187

Dear Madam or Gentlemen:

The undersigned represents Robert I. Lawson, Jr. in connection with his desire to complete and submit an application for relief from disability regarding his possession of firearms. Mr. Lawson sustained a felony conviction in the U.S. District Court, Eastern District of Louisiana. He has completed his sentence of probation and wishes to make application for relief from firearms disability.

Please send me the number of copies you require to be completed. Should you have any questions about this request, kindly call the undersigned at (504) 524-2323.

Thanking you in advance for your courtesies, I am

Very truly yours,

ROBERT N. HABANS, JR.

RNH:pfj

cc: Mr. Robert I. Lawson, Jr.

APPENDIX L

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
Washington, DC 20226

[Feb. 26, 1998]

E:CE:F:F:RCA
3319

Mr. Robert N. Habans, Jr.
Attorney at Law
1515 Poydras Street
Suite 2323
New Orleans, Louisiana 70112

Dear Mr. Habans:

This is in reference to your letter requesting an application for restoration of Federal firearms privileges for your client, Mr. Robert I. Lawson Jr.

As a result of the passage of Public Law 104-52, approved on November 19, 1995, the Bureau of Alcohol, Tobacco and Firearms (ATF) is prohibited from acting upon or investigating applications for relief from Federal firearms disabilities under 18 U.S.C. section 925(c) for individuals. A provision incorporated in Public Law 104-52 states that ATF may investigate and act upon applications filed by corporations (but not for individuals) for relief from Federal firearms disabilities. Until this restriction is removed by Congress, ATF is unable to take any action on requests for restoration of Federal firearms privileges for individuals. In view of the above restriction, we are unable to process your request at this time.

You should also be advised that this law does not change your client's status as a prohibited person. Your client is still prohibited from possessing, receiving, transporting, or shipping firearms under Federal law.

We recommend that you contact our office about obtaining restoration of Federal firearms privileges for your client should Congress act to remove the restriction currently imposed.

We trust this has been responsive to your letter. If further assistance is needed, please contact Firearms Restoration Specialist Vivian Pena at (202) 927-8040.

Sincerely yours,

/s/ Lewis P. Raden
LEWIS P. RADEN
Special Agent in Charge
Firearms Enforcement Branch

APPENDIX M

[Filed Feb. 2, 1998]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 8-0350

JAMES H. KOSTMAYER, JR. and ROBERT I. LAWSON, JR.

versus

JOHN W. MAGAW, DIRECTOR
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
UNITED STATES DEPARTMENT OF TREASURY

PETITION FOR WRIT OF MANDAMUS,
OR, IN THE ALTERNATIVE,
FOR DECLARATORY JUDGMENT

NOW INTO COURT, come petitioners, James H. Kostmayer, Jr. ("Kostmayer") and Robert I. Lawson, Jr. ("Lawson"), who respectfully request the issuance of a Writ of Mandamus compelling defendant, John W. Magaw, Director, Bureau of Alcohol, Tobacco and Firearms, United States Department of Treasury, to process and grant petitioners' Applications for Restoration of Firearms Privileges pursuant to 18 U.S.C. § 925(c). In the alternative, petitioners respectfully request that this Court issue a Declaratory Judgment that 18 U.S.C. § 922(g)(1) and § 925(c) are unconstitutional under Amendment II, United States Constitution, as applied to petitioners in that petitioners have received a full and complete pardon and the restoration of all civil rights by the State of Loui-

siana, specifically including the right to bear arms. In support of this petition, petitioners respectfully aver as follows:

I.

Jurisdiction of this Honorable Court is based upon 28 U.S.C. § 1361 and 5 U.S.C. § 706 as to the Petition for Mandamus, and 28 U.S.C. § 1331(a) and 28 U.S.C. § 2201 for the alternative relief seeking a Declaratory Judgment.

II.

Venue in this District is proper in that 1) petitioner Kostmayer is a domicile and resident of St. Tammany Parish, State of Louisiana, which is within the Eastern District of Louisiana, 2) petitioner Lawson is a domicile and resident of Jefferson Parish, State of Louisiana, which is within the Eastern District of Louisiana, and 3) no real property is involved in this action. 28 U.S.C. § 1391(e).

III.

The duties and responsibilities subject to this Petition for Mandamus and/or Declaratory Judgment are vested in the Secretary of the Treasury pursuant to 18 U.S.C. § 925(c). The Secretary of the Treasury, in turn, has delegated the authority to restore firearms privileges to the Director of the Bureau of Alcohol, Tobacco, and Firearms. 27 C.F.R. § 178.144. Thus, the defendant is the proper named party.

PETITION FOR WRIT OF MANDAMUS

IV.

On January 5, 1994, petitioner Kostmayer was convicted of violating 18 U.S.C. § 371 (conspiracy to defraud the United States Government), and was sentenced

to ten (10) months in the custody of the Bureau Prisons and three (3) years of supervised probation. *United States v. Kostmayer*, Criminal Action No. 93-360, Section "H", United States District Court for the Eastern District of Louisiana. This offense was neither a crime of violence nor a crime involving the use of a firearm.

V.

Petitioner Kostmayer's probationary period and period of supervised release terminated as of December 3, 1997. *See* Exhibit A, Minute Entry of Judge Adrian A. Duplantier, December 3, 1997 (entered December 4, 1997), and Exhibit B, letter of December 4, 1997 to petitioner Kostmayer from the United States Probation Office, Eastern District of Louisiana.

VI.

On October 11, 1995, the Governor of the State of Louisiana granted ". . . a restoration of full rights of citizenship, including the right to own, possess, receive, ship and transport firearms, and remission of all forfeitures resulting from such conviction, to James H. Kostmayer, Jr." (Exhibit C).

VII.

On July 22, 1997, petitioner Kostmayer filed an Application for Restoration of Firearms Privileges pursuant to 18 U.S.C. § 925(c) in full compliance with that statute and all relevant BATF regulations (Exhibit D).

VIII.

Defendant has taken no action whatsoever to process and grant or deny petitioner Kostmayer's application. Upon information and belief, petitioner Kostmayer alleges that defendant refuses to so process petitioner's applica-

tion due to an alleged withholding of funding by the Legislative Branch from the Executive Branch to force the BATF not to extend the constitutional benefits of 18 U.S.C. § 925(c).

IX.

On December 15, 1993, petitioner Lawson was convicted of one violation of 26 U.S.C. § 7206(1) for submitting a false IRS Form 941, and was sentenced to a probationary period of two (2) years. *United States v. Lawson,* Criminal Action No. 93-360, Section "H", United States District Court for the Eastern District of Louisiana. This offense was neither a crime of violence nor a crime involving the use of a firearm.

X.

Petitioner Lawson's probationary period and period of supervisory release terminated, petitioner Lawson was discharged, and the proceedings were terminated on March 2, 1995. *See* Exhibit E, Order of Judge Adrian Duplantier, March 2, 1995 (entered March 3, 1995).

XI.

On November 27, 1995, the Governor of the State of Louisiana granted ". . . a restoration of full rights of citizenship, including the right to own, possess, receive, ship and transport firearms, to Robert Lawson, and remission of all forfeitures resulting from this conviction . . ." (Exhibit F).

XII.

On November 21, 1995, counsel for petitioner Lawson requested the Bureau of Alcohol, Tobacco and Firearms to provide application forms "for relief from disability regarding his possession of firearms" (Exhibit G).

XIII.

On February 26, 1996, counsel for petitioner Lawson was informed by the Bureau of Alcohol, Tobacco and Firearms that the request for an application form was denied as a result of Public law 104-52 (Exhibit H).

XIV.

Petitioners, on successfully completing the terms of their sentence and their supervised release, and having received a full and complete restoration of civil rights specifically including the right to bear firearms, are entitled to defendant's ministerial act of granting relief pursuant to 18 U.S.C. § 925(c).

XV.

Refusal by defendant to ministerially process and grant petitioners' Applications for Restoration of Firearms Privileges pursuant to 18 U.S.C. § 925(c) are violations of Amendment II to the United States Constitution which creates a personal right in petitioners and all citizens to keep and bear arms, which right "shall not be infringed." Defendant's refusal infringes this constitutional provision which is a restriction on governmental power. The government's regulatory scheme is also a *per se* infringement.

XVI.

Therefore, petitioners are entitled to a Writ of Mandamus requiring defendant to process and grant their applications pursuant to 18 U.S.C. § 925(c).

ALTERNATIVE RELIEF: REQUEST FOR DECLARATORY JUDGMENT

XVII.

Paragraphs I through XVI are specifically realleged herein.

XVIII.

Alternative to the granting of a Writ of Mandamus directed to defendant, petitioners are entitled to a Declaratory Judgment stating that:

(1) 18 U.S.C. § 925(c) is unconstitutional and is at least unconstitutional when applied to citizens successfully completing a criminal sentence and who have received a full and complete pardon by their sovereign States of domicile which specifically restored all civil rights including the right to bear arms;

(2) Amendment II of the United States Constitution creates a personal right in each citizen that shall not be infringed, and 18 U.S.C. § 925(c) as applied to the recipient of a full pardon is such an infringement; and

(3) petitioners' individual right to bear arms is uninfringed and the provisions of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 925(c) therefore do not apply.

WHEREFORE, petitioners, James H. Kostmayer, Jr. and Robert I. Lawson, Jr., respectfully request the issuance of a Writ of Mandamus directed to John W. Magaw, Director, Bureau of Alcohol, Tobacco and Firearms, United States Department of Treasury, specifically directing defendant to process and grant petitioners' Applications for Restoration of Firearms Privileges pursuant to 18 U.S.C. § 925(c), or, in the alternative, petitioners, James H. Kostmayer, Jr. and Robert I. Lawson, Jr., specifically request the issuance of an Order from this Court declaring that 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 925(c) are unconstitutional as applied to petitioners and that petitioners' right to bear arms pursuant to Amendment II of the United States Constitution are not infringed.

Respectfully submitted,

/s/ K. Eric Gisleson
K. ERIC GISLESON (1060)

—of—

CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY, L.L.P.
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2300
Telephone: (504) 585-7000
Attorneys for Petitioners

APPENDIX N

UNITED STATES CONSTITUTION

U.S. Const. art. 1, § 8, cl. 3:

The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * * *

U.S. Const. amend. II:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. IX:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. amend. X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FEDERAL STATUTES INVOLVED

18 U.S.C. § 922. Unlawful acts

* * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * *

18 U.S.C. § 925. Exceptions: Relief from disabilities

* * * *

(c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage

of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter, shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever, the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

* * * *

28 U.S.C. § 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Public Law 102-393 [H.R. 5488]; October 6, 1992

TREASURY, POSTAL SERVICE, AND GENERAL GOVERNMENT APPROPRIATIONS ACT, 1993

* * * *

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Treasury Department, the United States Postal Service, the Executive Office of the President, and certain Independent Agencies, for the fiscal year ending September 30, 1993, and for other purposes, namely:

TITLE I
DEPARTMENT OF THE TREASURY

* * * *

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

SALARIES AND EXPENSES

For necessary expenses of the Bureau of Alcohol, Tobacco and Firearms, * * * *Provided further*, That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c).

* * * *

27 CFR Ch. 1 (4-1-98 Edition)

Bureau of Alcohol, Tobacco and Firearms, Treasury

§ 178.144 Relief from disabilities under the Act.

(a) Any person may make application for relief from the disabilities under section 922(g) and (n) of the Act (see § 178.32).

* * * *

(d) The Director may grant relief to an applicant if it is established to the satisfaction of the Director that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety, and that the granting of the relief would not be contrary to the public interest. The Director will not ordinarily grant relief if the applicant has not been discharged from parole or probation for a period of at least 2 years. Relief will not be granted to an applicant who is prohibited from possessing all types of firearms by the law of the State where such applicant resides.

* * * *

Supreme Court, U.S.
FILED
SEP 8 1999
OFFICE OF THE CLERK

(2)

No. 99-71

In the Supreme Court of the United States

JAMES H. KOSTMAYER, JR. AND ROBERT I. LAWSON,
PETITIONERS

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
MARK B. STERN
THOMAS M. BONDY
Attorneys
Department of Justice
Washington, DC 20530-0001
(202)514-2217

13pp

QUESTION PRESENTED

Section 922(g)(1) of Title 18 of the United States Code prohibits convicted felons, such as petitioners, from possessing any firearm in or affecting commerce. The question presented is whether that prohibition, as applied to petitioners, violates the Second Amendment, the Ninth Amendment, or the Commerce Clause.

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In the Supreme Court of the United States

No. 99-71

JAMES H. KOSTMAYER, JR. AND ROBERT I. LAWSON,
PETITIONERS

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 178 F.3d 1291 (Table). The decision of the district court (Pet. App. 3a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1999. The petition for a writ of certiorari was filed on July 8, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 18 U.S.C. 922(g)(1), it is "unlawful for any person * * * who has been convicted in any court of a crime punishable by imprisonment for a term exceeding

one year * * * [to] possess in or affecting commerce, any firearm or ammunition." Section 925(c) authorizes the Director of the Bureau of Alcohol, Tobacco and Firearms (ATF) to lift that prohibition if, after an investigation, "it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. 925(c).

In each of the annual ATF appropriations bills enacted since 1992, however, Congress has barred ATF from employing any appropriated funds "to investigate or act upon applications for relief" under Section 925(c). *E.g.*, Pub. L. No. 105-277, 112 Stat. 2681, 2681-485 (1998).[1] Concerned that an ATF determination to grant relief "could have devastating consequences for innocent citizens if the wrong decision is made," Congress has concluded that ATF's scarce resources "would be better utilized" on more pressing matters, such as suppressing violent crime. S. Rep. No. 106, 103d Cong., 1st Sess. 20 (1993); S. Rep. No. 353, 102d Cong., 2d Sess. 19-20 (1992); see also H.R. Rep. No. 183, 104th Cong., 1st Sess. 15 (1995).

2. Petitioner Kostmayer was convicted in 1994 of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and petitioner Lawson was convicted in 1993 of submitting a false tax return, in violation of 26

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[1] Accord Pub. L. No. 105-61, 111 Stat. 1272, 1277 (1997); Pub. L. No. 104-208, 110 Stat. 3009, 3009-319 (1996); Pub. L. No. 104-52, 109 Stat. 468, 471 (1995); Pub. L. No. 103-329, 108 Stat. 2382, 2385 (1994); Pub. L. No. 103-123, 107 Stat. 1226, 1228 (1993); Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992).

U.S.C. 7206(1). Those federal felony convictions subject petitioners to the firearms disability set forth in Section 922(g)(1). See Pet. App. 23a-25a. Both petitioners filed applications for relief under Section 925(c). ATF informed petitioners that, in light of Congress's restriction on the use of appropriated funds, it could take no action on their applications. *Id.* at 13a-14a, 20a-21a.

Petitioners then filed this action in district court. Pet. App. 22a. In their complaint, they sought a writ of mandamus compelling ATF to consider their applications and, alternatively, a declaratory judgment that 18 U.S.C. 922(g)(1) and 925(c), as applied to them, violated the Second Amendment. Pet. App. 22a. According to the complaint, petitioners, both of whom reside in Louisiana and were convicted there, had each received pardons from the Governor of that State restoring their civil rights in connection with the conduct underlying their federal crimes. *Id.* at 22a-28a.

In April 1998, the district court ruled for the government. Pet. App. 4a-5a. The court reasoned that, "[i]nsofar as plaintiff[s] seek[] relief from the firearm disabilities created by 18 U.S.C. 922(g)(1) through an order directing the Bureau of Alcohol, Tobacco and Firearms to grant petitioners' applications for relief from those disabilities, this court lacks jurisdiction." *Id.* at 4a. The court then rejected petitioners' constitutional claim on its merits, explaining, *inter alia*, that "it is irrelevant that plaintiffs have each received a pardon from the governor of Louisiana restoring their civil rights, including the right to bear arms. A state pardon cannot relieve an individual of the * * * effects of a federal conviction." *Id.* at 5a.

The Fifth Circuit affirmed in an unpublished, *per curiam* order, relying on "essentially the reasons assigned by the district court." Pet. App. 2a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of any other court of appeals or of this Court. Further review is therefore not warranted.

1. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *United States* v. *Miller*, 307 U.S. 174 (1939), this Court rejected a Second Amendment challenge to a federal indictment for possession of a sawed-off shotgun, reasoning that the Second Amendment creates no right to possess such a weapon in the absence of "some reasonable relationship to the preservation or efficiency of a well regulated militia." *Id.* at 178. The Court reaffirmed that holding in *Lewis* v. *United States*, 445 U.S. 55, 66 (1980). And, as petitioners recognize, the courts of appeals have interpreted this Court's precedent "to hold that the Second Amendment creates only a 'collective' right in the states to keep and bear arms rather than an individual right." Pet. 11 (citing *Hickman* v. *Block*, 81 F.3d 98, 100-101 (9th Cir.), cert. denied, 519 U.S. 912 (1996); *Love* v. *Pepersack*, 47 F.3d 120, 124 (4th Cir.), cert. denied, 516 U.S. 813 (1995)); see also *Gillespie* v. *City of Indianapolis*, No. 98-2691, 1999 WL 463577 (7th Cir. July 9, 1999) (adopting similar analysis in rejecting Second Amendment claim on the merits, while recognizing individual's standing to assert that claim).

Petitioners disagree (Pet. 9-15) with that long-standing consensus, arguing that the Second Amendment does in fact create an individual right to possess firearms quite apart from any relationship to the maintenance of a well regulated state militia. Whether

or not that issue might someday warrant further consideration by this Court, this case would be an inappropriate vehicle for addressing it, because the Court has squarely held that convicted felons such as petitioners have no constitutional right to possess firearms. In *Lewis*, this Court rejected a constitutional challenge to the predecessor of 18 U.S.C. 922(g)(1), explaining that "Congress could rationally conclude that *any* felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm." 445 U.S. at 66 (emphasis added). Referring explicitly to the Second Amendment, the Court concluded that "[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." *Id.* at 65 n.8. Petitioners' Second Amendment argument is irreconcilable with that holding.

2. Petitioners also claim (Pet. 15-16) that their federal firearms disability violates the Ninth Amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." As petitioners appear to acknowledge (Pet. 17), however, the courts of appeals have consistently rejected any argument that the Ninth Amendment somehow creates rights of access to firearms. See, *e.g.*, *San Diego County Gun Rights Comm.* v. *Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996); *United States* v. *Broussard*, 80 F.3d 1025, 1041 & n.11 (5th Cir.), cert. denied, 519 U.S. 906 (1996).

Moreover, the premise of the specific Ninth Amendment argument presented here is foreclosed by this Court's precedent. Petitioners argue that, even though they were convicted of felonies under federal law,

"principles of federalism" preclude the imposition of federal firearms restrictions now that Louisiana has (they allege) restored their civil rights under *state* law. See Pet. 15-22. In *Beecham* v. *United States*, 511 U.S. 368 (1994), however, this Court held that once an individual has been convicted under federal law, only a *federal* pardon or civil rights restoration, and not a state pardon or civil rights restoration, can relieve him of his federal disabilities. *Id.* at 370-374. As petitioners observe (Pet. 19-20), the Court "express[ed] no opinion" on *how* (if at all) a federal felon can secure the restoration of his civil rights under federal law. 511 U.S. at 373 n.*. That question, which the Court deemed immaterial to its holding, has no bearing on the question presented here: whether the restoration of a felon's civil rights under state law necessarily removes any federal firearms disability. Again, *Beecham* answers that latter question in the negative. See also *id.* at 373 ("Many jurisdictions have no procedure for restoring civil rights. * * * Under our reading of the statute, a person convicted in federal court is no worse off than a person convicted in a court of a State that does not restore civil rights.").[2]

3. Finally, petitioners argue (Pet. 17; see Pet. 20-22) that, in enacting Section 922(g)(1), Congress "has exceeded its powers under the Commerce Clause." See U.S. Const. Art. I, § 8, Cl. 3. But, unlike the federal firearms prohibition invalidated in *United States* v. *Lopez*, 514 U.S. 549 (1995), Section 922(g) contains an

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[2] Petitioners' related arguments under the Tenth Amendment (see Pet. 17) are similarly without merit. Moreover, petitioners did not invoke the Tenth Amendment at any point in the proceedings below, and they have therefore waived any Tenth Amendment argument in this Court.

explicit interstate commerce element that must be satisfied before a defendant can be convicted. See 18 U.S.C. 922(g) ("It shall be unlawful for any [qualifying] person * * * *to ship or transport in interstate or foreign commerce, or possess in or affecting commerce*, any firearm or ammunition; or to receive any firearm or ammunition *which has been shipped or transported in interstate or foreign commerce.*") (emphasis added). For that reason alone, as the courts of appeals have uniformly held, Section 922(g) is a valid exercise of Congress's authority under the Commerce Clause.[3] And, because Commerce Clause principles cannot support a challenge to Section 922(g), neither could they support a challenge to the disposition of petitioners' request for an exemption from that provision under Section 925(c).[4]

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[3] See, *e.g.*, *United States* v. *Abernathy*, 83 F.3d 17, 20 (1st Cir. 1996); *United States* v. *Sorrentino*, 72 F.3d 294, 296-297 (2d Cir. 1995); *United States* v. *Gateward*, 84 F.3d 670, 671-672 (3d Cir.), cert. denied, 519 U.S. 907 (1996); *United States* v. *Wells*, 98 F.3d 808, 811 (4th Cir. 1996); *United States* v. *Pierson*, 139 F.3d 501, 503-504 (5th Cir.), cert. denied, 119 S. Ct. 220 (1998); *United States* v. *Turner*, 77 F.3d 887, 889 (6th Cir. 1996); *United States* v. *Bell*, 70 F.3d 495, 497-498 (7th Cir. 1995); *United States* v. *Shelton*, 66 F.3d 991, 992 (8th Cir. 1995), cert. denied, 517 U.S. 1125 (1996); *United States* v. *Hanna*, 55 F.3d 1456, 1461-1462 (9th Cir. 1995); *United States* v. *Bolton*, 68 F.3d 396, 400 (10th Cir. 1995), cert. denied, 516 U.S. 1137 (1996); *United States* v. *McAllister*, 77 F.3d 387, 389-390 (11th Cir.), cert. denied, 519 U.S. 905 (1996); see also *Scarborough* v. *United States*, 431 U.S. 563 (1977) (construing predecessor to Section 922(g) to satisfy Commerce Clause); *United States* v. *Bass*, 404 U.S. 336 (1971) (same).

[4] Petitioners' request for mandamus on their Section 925(c) application rests on the premise that the Constitution shields them from the application of Section 922(g). See Pet. 25-27. That premise is false for the reasons discussed above. The petition presents no issue concerning whether, apart from any constitutional chal-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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lenge to Section 922(g), the district courts have authority to consider the statutory merits of Section 925(c) applications in the first instance. Compare *Owen* v. *Magaw*, 122 F.3d 1350 (10th Cir. 1997) (district court has no such authority); *Burtch* v. *United States Dep't of the Treasury*, 120 F.3d 1087 (9th Cir. 1997) (same); *United States* v. *McGill*, 74 F.3d 64 (5th Cir.) (same), cert. denied, 519 U.S. 821 (1996), with *Rice* v. *United States*, 68 F.3d 702 (3d Cir. 1995) (contra). In any event, even if the issue were presented, this Court's review would be unwarranted for the reasons set forth in our brief in opposition to certiorari in *McGill* v. *United States*, 519 U.S. 821 (1996) (No. 95-2015). (We have served counsel for petitioners with a copy of that brief.)